Court of Appeals, State of Michigan

ORDER

Harry D. Moore v Garfield Court Assoicates

Docket No. 267440

LC No. 05-000184 NO

Helene N. White
Presiding Judge

E. Thomas Fitzgerald

Michael J. Talbot
Judges

The Court orders that the 5/23/06 opinion is hereby AMENDED. The opinion contained the following clerical error: Judge Michael J. Talbot is listed in the signature line on the majority opinion. The name is hereby deleted.

In all other respects, the 5/23/06 opinion remains unchanged.

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

JUN 0 7 2006

Date

Sandra Schultz Mengel

Chief Clerk

STATE OF MICHIGAN

COURT OF APPEALS

HARRY D. MOORE,

Plaintiff-Appellant,

v

GARFIELD COURT ASSOCIATES,

Defendant-Appellee.

UNPUBLISHED
May 23, 2006

No. 267440
Macomb Circuit Court
LC No. 05-000184-NO

Before: White, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

Plaintiff appeals as of right from a circuit court order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(8) and (10) in this premises liability action. We reverse. This case is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff lived in an upper-level apartment of an apartment complex. He was injured when the second step (from the bottom) of an exterior stairway that consisted of about 13 steps, broke apart. The stairs were made of reinforced cement. Before the accident, plaintiff noticed that some of the steps had "hairline cracks and things of that nature," but he did not notice cracks in the step in question. On the day of the accident, before his fall, plaintiff used the stairs about four or five times. When asked at deposition whether he had the opportunity to look at the condition of the steps on the day of his fall, plaintiff responded that he "was carrying groceries back and forth to the car, getting ready to go on a hunting trip," but on the trips back from the car his view of the stairs was not obstructed. Plaintiff testified that on the day he fell, he did not notice anything that would indicate a structural problem with the steps, and they did not feel loose or appear to be crumbling.

When plaintiff fell, he fell forward as he was going down the stairs. After he fell, he observed that the step "had broken away from the re-rod, the reinforcement rod that goes through the steps and it was rotted out." With respect to causation, plaintiff, who had worked with cement for 30 to 35 years and "learned the trade" doing driveways, walkways, and stairs, believed that road salt used to melt snow and ice caused the cement around the reinforcement rods to deteriorate and led to the cement breaking away. He testified that he saw salt on the steps "a few" mornings. Plaintiff testified that the precarious condition of the particular step was not visible.

Q. So if you were to have looked at that step you are saying that there wouldn't have been anything that you could have seen?

A. There was no way of telling that the step was rotten down on the inside. There was no way just by looking at it until it was broken.

Defendant moved for summary disposition, arguing that in light of plaintiff's deposition testimony that the defect was not noticeable, defendant could not have known of the defect in the step. In response, plaintiff argued that defendant actively created the dangerous condition by using rock salt on the cement.

The circuit court granted summary disposition pursuant to both MCR 2.116(C)(8) and (10), but it is apparent that the court relied on evidence outside the pleadings. Therefore, this Court will treat the decision as having been based only on MCR 2.116(C)(10). *Krass v Tri-County Security, Inc*, 233 Mich App 661, 664-665; 593 NW2d 578 (1999). Summary disposition may be granted under MCR 2.116(C)(10) when "there is no genuine issue of material fact, and the moving party is entitled to judgment . . . as a matter of law." This Court reviews a trial court's decision on a motion for summary disposition de novo. *Maiden v Rozwood,* 461 Mich 109, 118; 597 NW2d 817 (1999).

The parties agree that plaintiff, as a tenant, was an invitee. An invitor owes a duty to his invitees to inspect the premises and make any necessary repairs or warn of discovered hazards. *Stitt v Holland Abundant Life Fellowship,* 462 Mich 591, 597; 614 NW2d 88 (2000).

An invitor's liability must arise from the invitor's active negligence or an unsafe condition that is known to the invitor or is of such a character or has existed a sufficient length of time that the invitor should have had knowledge of it. *Clark v Kmart Corp,* 465 Mich 416, 419; 634 NW2d 347 (2001). Plaintiff did not argue that defendant knew of the precarious condition of the step or that it existed for a sufficient length of time that defendant should have known about it. Rather, plaintiff's position is that defendant actively created the condition, i.e., was actively negligent, by using road salt on cement. In *Hampton v Waste Mgt of Michigan, Inc,* 236 Mich App 598, 604; 601 NW2d 172 (1999), this Court recognized that the principle that notice need not be shown where a dangerous condition is caused by a premises possessor or its employees "applies only where an employee of a premises possessor creates a dangerous condition through an *unreasonable* act or omission that breaches a duty owed to a visitor on the land. In other words, that a *reasonable* act or omission of a premises possessor or its employee plays a role in the creation of a dangerous condition does not make the premises possessor liable for any injury to an invitee that is causally connected to that reasonable act or omission."

Here, plaintiff's theory is that defendant was actively negligent by using salt on concrete steps. Plaintiff testified that he had worked with cement for over 30 years. Through this experience, he knows that rock salt had caused the cement around the reinforcement rods to deteriorate and led to the cement breaking away on the step. Plaintiff testified that rock salt gets down into the cracks of cement, and rots the cement away from the reinforcement rods, and that one should never use salt on cement because of that chemical reaction. Plaintiff testified that rock salt and calcium chloride are visually different and that he had witnessed defendant using rock on the cement stairs in question.

We conclude under these circumstances that plaintiff submitted competent evidence that defendant's conduct in using rock salt, rather than calcium chloride, was unreasonable, and that a genuine issue remained on this question such that defendant was not entitled to summary disposition.

Reversed.

/s/ Helene N. White
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot